No. 120.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

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REUBEN M. MANLEY, Executor of the Estate of GEORGE MANLEY, deceased,
Plaintiff in Error;
vs.
ANNA O. PARK, Successor in Interest and substituted for RICHARD A. PARK, deceased,
Defendant in Error.

ARGUMENT OF DEFENDANT IN ERROR.

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THE HOBB PRINTING CO., ATCHISON, KANSAS.

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ARGUMENT OF DEFENDANT IN ERROR.

Defendant in error having filed motion to dismiss or affirm is required by the rule of court to submit her brief thereon thirty days before the hearing of such motion. For that reason, defendant in error submitted her brief thereon and therewith her brief on the merits before brief of plaintiff in error was received.

Having now examined the brief of plaintiff

in error, we beg to submit the following argument:

UPON MOTION OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM.

The issues in the trial court, upon which the case was tried and judgment rendered, presented no Federal question. The petition stated a cause of action under the Kansas Code (Record, p. 5). The answer of defendant, plaintiff in error, presented no Federal question (Record, p. 22), and the reply responsive thereto presented no such question. Upon such issues trial was had and judgment rendered December 15, 1897 (Record, p. 29). Proceedings in error were then taken to the Supreme Court of Kansas by the defendant below, by that court dismissed and mandate of dismissal filed in the District Court December 12, 1899 (Record, p. 34).

By such original judgment every question which was or could have been raised as a defense to the plaintiff's cause of action, was conclusively adjudicated, including the construction and constitutionality of the statutes involved therein, and could not again be raised either in the same or in other action or in any proceeding involving the validity of such judgment. The claim is made by defendant below that the statute under which such action was prosecuted was in conflict with both the state and Federal constitution, and that the court for that reason

did not have jurisdiction to render the same, and hence its judgment is void, and raised such question by motions to set aside the judgment and order of sale thereon. The case was tried upon such motions only, with judgment against the defendant below, proceedings in error to the Supreme Court of Kansas and there affirmed, upon the ground and for the reason, as stated by the court, that the original judgment was final and conclusive and necessarily involved all of the questions raised by such motions.

Just here is the distinction between the contention of defendant in error and plaintiff in error; the former urging that the original judgment was *res judicata* as to all such questions and therefore that any questions, Federal or other, raised by the supplemental motions were not presented in time, while plaintiff in error contends that the decision on such supplemental motions was upon original proceedings and that any question raised therein should be considered accordingly. In other words, the claim is, that every succeeding step raised or presented by him, is independent of the original judgment and must be treated in all respects as an original proceeding, as though no original judgment, though involving the same question, had been rendered. This is clearly evident from examination of the brief of plaintiff in error upon motion to dismiss or affirm (pp. 15 to 32).

The judgment of the Supreme Court of Kan-

sas (Record, pp. 44 to 49) was rendered solely upon the ground that the original decision, whether correct or otherwise, until reversed, was binding on every other court, and for that reason and that alone, the judgment of that court was against the motions of plaintiff in error.

The claimed Federal question was not raised in time.

Such motion of the plaintiff in error was just as clearly an attempt to review and if possible, secure a reversal of the original judgment upon the grounds stated in such motion, as though they had been presented by a petition for re-hearing after the final judgment of the court below, and such fact cannot be covered up by the pretext that the original judgment was void for want of jurisdiction of the court, based solely upon the claimed error of the court in holding that the law under which the judgment was rendered was constitutional. The constitutionality of any statute under which

redress is sought and upon which the claimed right of recovery or defense is based, is just as clearly within the issues as though specifically pleaded.

Such Federal question having thus been first raised after the final judgment of the court below and after the judgment of the Supreme Court dismissing the proceedings, and by supplemental motions, was, therefore, not presented until after the first appeal and the judgment had become conclusive upon that and all other courts. Any other construction of this rule permits an indirect attack upon the judgment and operates as a second appeal.

That a Federal question may be first raised in the Supreme Court of a state, we have not controverted. Our contention is that it cannot be raised in the Supreme Court or elsewhere upon second appeal nor after an original judgment has been rendered, from which no appeal or proceedings in error has been taken. The question must at least be raised before the judgment has obtained the condition of *res judicata*, as after it has acquired that condition, no question, Federal or otherwise, based upon the original cause of action or defense, can be raised.

The Federal question may, under the rule stated, be raised at any time before the original judgment becomes final and conclusive, as, on motion for a new trial, or upon petition in

error to the Appellate Court, or by brief in that court, or by petition for re-hearing before that court has rendered a final judgment. After the judgment has become final and conclusive, it cannot be raised either upon second appeal or by petition for re-hearing after final judgment rendered by the Supreme or Appellate Court. This rule is clearly stated in the cases cited in support of motion of defendant in error to dismiss.

The cases cited upon the motion in brief of plaintiff in error upon that ground are not in conflict with this rule.

In Sully v. American National Bank, 178 U. S., 209, the question was raised in the Supreme Court *before final judgment*, and there held that that court decided against the plaintiff in error *on that question*, not on the ground that it had not been raised in the lower court. In this case, the Supreme Court decided against the claimed Federal question for that the original judgment was *res judicata*. Such question could not therefore have been involved.

In Consolidated Coal Co. v. The People, 185 U. S., the Federal question was presented in a motion in arrest of judgment and before final judgment in the cause.

In Endowment & Benev. Assn. of Kan. v. Kansas, 120 U. S., 123, it was presented in a motion for a new trial in the District Court.

In Clark v. Pennsylvania, 128 U. S., 395, it was raised in instructions in the trial court.

In Kennebeck R. Co. v. Portland R. Co., 81 U. S., 23, the Federal question was discussed in the State Supreme Court and decided before final judgment was rendered therein.

In C. B. & Q. R. Co. v. Chicago, 166 U. S. 226, the question was raised in motion for a new trial.

In Rothschild v. Knight, 184, U. S., 589, it was raised before the final opinion of the Supreme Court was certified.

No Federal question was decided or necessary to the decision.

The decision was clearly upon grounds other than a Federal question. The decision of the State Supreme Court fully sustains this contention. The reasons given for affirming the decision of the lower court were based solely upon the doctrine of *res judicata* and an examination of such decision discloses that no other question was regarded by the court in its decision. While that court discussed other questions, its decision was upon that ground and that only.

Plaintiff in error urges that such decision in effect holds that the statute of Kansas relied upon by defendant in error, is not repugnant

to the constitution of the United States, but the decision is upon the ground that the court was bound by the former judgment of the trial court. The plaintiff in error claims that the original judgment was void for want of jurisdiction of the trial court, but rests such claimed want of jurisdiction, not upon the ground that the court did not have jurisdiction of that class of cases, nor that the law creating the court was unconstitutional, but upon the ground that the District Court erred in holding that the statute giving the right to prosecute the action in that form was in conflict with the constitution. The argument is that the claimed error of the court in rendering the original judgment was want of jurisdiction, and in support of such argument cites numerous cases which are not in point, and among others the following:

In National Foundry Co. v. Oconto etc., 183 U. S., 216, the state court decided in favor of one Federal decree and against the effect of another, and because of the decision in the latter respect it was properly held that a Federal question was decided.

In Capital City etc. Co. v. State ex rel. 183 U. S., 283, a corporation was ousted of its franchises because it violated all of certain statutes, some of which were and some were not in conflict with the Federal constitution, and it was held that to the extent that such decision was

upon the statutes which were in conflict with the federal constitution, a Federal question was certainly involved.

In M. K. & T. Ry. Co. v. Elliott, 184 U. S. 695, a Federal question was in fact involved but the state court declared that no such question was presented and it was properly held that the state court could not, by such ruling, exclude from the case the Federal question which was actually presented.

In Anderson v. Carkins, 135 U. S., 483, the defendants claimed protection under the homestead laws of Congress, which claim was not sustained by the state court and it was again correctly held that the state court could not exclude a question actually presented by deciding that it was not involved.

In Columbia, etc., Co. v. Light & Power Co., 172 U. S., 475, a contract was involved which was subject to two constructions, by one of which it was impaired by state legislation, and by another it was not. The state court so construed the contract that it was not impaired by legislation, and refused the other construction, and it was held that such decision involved all the legal questions presented of impairment as well as non-impairment, and for that reason the Federal question was involved.

In McCully v. Virginia, 172 U. S., 102, cited in the last case, it was held that a decision of

a state court that a later statute did not impair a contract made under a prior statute, involved a Federal question and correctly so, because the question of impairment was a Federal question, and that question was, in fact, decided by the state court and could not be excluded by its construction of the contract.

In First National Bank v. Anderson, 172 U. S., 573, the state court decided that the National Banking Act did not prohibit the sale of certain collaterals and was clearly a construction of that Act and involved a Federal question arising thereunder.

In Bank v. Townsend, 139 U. S., 67, the same question of construction was presented and decided by the state court, and it was also there held that a Federal question was presented.

The decisions so relied upon do not in any respect conflict with the rule that where no Federal question was, in fact, necessary to the decision of the state court, and such decision was clearly upon grounds other than those involving a Federal question this court will not take jurisdiction, nor do the facts stated therein indicate that in this case such question was involved.

UPON THE MERITS OF THE CASE.

If the court shall hold that it has jurisdiction and considers the case upon its merits, the decision must be affirmed.

The specifications of error, as relied upon by plaintiff in error, involved three dissimilar propositions. The first and second (pp. 39 to 67, br. plff. in error) relate entirely to the construction of the laws of the State of Kansas and of the constitution of that state and to the question of such laws being void as in violation of such constitution.

Counsel therein asks this court to review the decision of the court of last resort of the State of Kansas and reverse such decision upon the ground that such court erred in the construction of the statute and constitution of that state, and to disregard the rule long recognized by this court, that it considers itself bound by the construction of the statutes and of the state constitution and the validity of such statute, when given by courts of last resort of the state, and presents at great length reasons which, in his judgment, show the error of the Supreme Court of Kansas in the con-

struction so by it given to the constitution and laws of the state.

We might pass this question upon the propositions and authorities submitted in brief of defendant in error (p. 20), but for the very great errors in the argument of plaintiff in error and statements of the statutes of that state, to which we now beg to call the attention of the court.

In quoting such statutes, counsel has not called attention to certain connecting sections which indicate those relating to domiciliary administration, and those relating to auxiliary administration.

By so doing, he makes the sections relating solely to domiciliary administrations apply, apparently, to administration upon estates of non-resident decedents, and states his conclusions thereon briefly, as follows:

"That such statutes give the Probate Courts exclusive jurisdiction in the matter of allowing claims against the estates of deceased persons.

"That suits may be instituted in courts of record to establish such claims, but the judgment rendered must, nevertheless, be exhibited and allowed by the Probate Court."

That the property of the estate cannot be attached.

That it is the established law in Kansas that the property of a dead man cannot be sold under execution, citing Achenbach v. Pomeroy Coal Co. 2 Kan. App. 357; Mendenhall v. Burnette, 58 Kan., 355. Br. plff. in error pp. 41-2.

Such claim is made upon Secs. 80, 83, 84, 86 of the Executor's and Administrator's Act, all of which relate to the granting of letters of administration by Probate Courts upon the estates of deceased residents of the state, not upon the estates of non-residents, and the same apply only to cases where administration is in fact granted by the Probate Court and not to estates upon which no letters are granted by such court. Such sections of the statute do not in any respect, refer to the estates of non-resident decedents, *upon which letters of administration have not been granted by any Probate Court*, as to which estates an entirely different statute applies, to wit:

"Sec. 3009. (G. S. 1901). An executor or administrator duly appointed in any other state or county may sue or be sued in any court in this state, in like manner and under like restrictions as a non-resident may sue or be sued."

After quoting certain other sections of the statute (br. pp. 42 to 46) counsel states as deductions therefrom the following proposition: "The issuing of letters testamentary to a non-resident executor is plainly allowable under Sec. 144 of the Executor's and Administrator's act, and Secs. 24 and 25 of the Will's Act."

Such Sec. 144 does not authorize the granting of letters testamentary or of administration to non-resident executors, but only that a non-resident executor, or administrator, if no resident be appointed, may file a copy of his appointment and may thereafter be authorized to sell the real estate for the payment of debts or legacies. The authority is *to sell the* real estate.

Such statute does not authorize the issuing of letters to such non-resident, on the contrary, the granting of such letters is expressly prohibited by the

"Sec. 2833. (G. S. 1901) which so far as relates to the granting of letters, provides: "Letters testamentary and of administration shall in no case be granted to a non-resident of this state."

Sec. 24 of the Will's Act provides only that foreign wills relative to property in Kansas may be admitted to record and when so admitted have the same validity as wills made in this state, as evidence of title, and Sec. 28 of such act provides that after such wills are admitted to record pursuant to the four preceding sections (Secs. 24-27) the court may grant letters of administration with the will annexed but only to residents under Sec. 2833, *supra*.

Such sections are as follows:

"Sec. 24. Authenticated copies of wills executed and proved according to the laws of any state or territory of the United States, relative

to any property in this state, may be admitted to record in the Probate Court of any county in this state where any part of such property may be situated; and such authenticated copies so recorded shall have the same validity as wills made in this state in conformity with the laws thereof. When any such will or authenticated copy has been or shall thereafter be admitted to record in the Probate Court of any county in this state where any part of such property may be situated, a copy of such recorded will, with a copy of the order to record the same annexed thereto, certified by the Probate Court under the seal of his court, may be filed and recorded in the office of the Probate Court of any other county in this state where any part of such property is situated; and it shall be as effectual in all cases as the authenticated copy of said will would be if proved and admitted to record by the court.

"Sec. 28. After allowing and admitting to record a will pursuant to the four preceding sections of this act, the court may grant letters testamentary thereon, or letters of administration with the will annexed, and may proceed in the settlement of the estate that may be found in this state: and the executor taking out letters, or the administrator with the will annexed, shall have the same power to sell and convey the real and personal estate, by virtue of the will or the law, as other executors or administrators with the will annexed shall or may have by law."

It is further asserted by plaintiff in error that by Sec. 144 of such statutes the estate of a non-resident executor is fully protected from attachment suits and placed in the custody of the Probate Court (br. p. 46). Such Section 144, as above suggested, permits the authenticated copy of the will to be filed for the purpose only of making sale of the real estate for the payment of debts and legacies, and in no respect authorizes the Probate Court to allow claims against the estate.

In support of such claim, it is further said by counsel (p. 47) that under Sec. 7 of the Executor's and Administrator's Act, the executor may be cited by the court to qualify, and upon his refusal the Probate Court shall commit administration of the estate, with will annexed to some other person. Sec. 7 relates only to estates of deceased residents, and is as follows:

"Sec. 7. If any person who is appointed an executor shall refuse to accept the trust, or if, after being duly cited for that purpose, he shall neglect to appear and accept the same, or if he shall neglect for twenty days after the probate of the will, to give bond as before prescribed, the court shall grant letters testamentary to the other executors, if there be any capable and willing to accept the trust: and if there is no such other executor, the court shall commit administration of the estate, with the will annexed, to the widow of the deceased, or to his next of kin, or to such other person as would have been entitled thereto, if the deceased had died intestate."

Secs. 1 to 30, relate entirely to resident

executors, and Sec. 28 above quoted, prohibits the granting of letters to non-residents of the state.

Such is well understood to be the meaning of said Sec. 7. How would it be possible for the Probate Court to cite a non-resident executor living in the state of New Jersey to qualify?

In Howell v. Mangelsdorf, 33 Kan., 194, Amsburg v. Exchange Bank, 33 Kan., 100, it was expressly held that no service even though made personally upon a party beyond the boundaries of the state would give the court jurisdiction over the person so served. The Howell case cites Rorer on Inter-State Law, 22. Freeman on Judgments, Sec. 564. Coleman's Appeal, 75 Pa. St., 441. Wells on Jurisdiction of Courts, Sec. 113.

It was not intended to authorize, as the ground of granting letters of administration, that the Probate Court should perform the useless act of attempting to have a citation served upon a non-resident, and it is certain that such Sec. 7 refers soley to parties resident of the State of Kansas and who may be entitled to letters testamentary or of administration, and this even though the statute (Sec. 28) did not expressly prohibit the appointment of non-residents. Under such statutes a resident administrator with will anexed might have been appointed upon the estate of George

Manley, deceased, but in the absence of such appointment and the taking charge of the estate of said deceased within Atchison County, the statute (Sec. 203) expressly provides that in such case suit may be brought in the District Court. Such section is as follows:

"Sec. 203. An executor or administrator duly appointed in other state or county may sue or be sued in any court in this state, in his capacity of executor or administrator, in like manner and under like restrictions as a non-resident may sue or be sued."

The case of Achenbach v. Pomeroy Coal Co. v. Kansas Appeal, 375, is said by counsel for plaintiff in error to be "exactly in point," and also that "an individual creditor could not, by execution, absorb more than his pro rata share of the dead man's estate." Such case is in no respect in point and no such rule is stated therein as clearly appears from the decision. In such case, Achenbach was a resident administrator, duly appointed by the Probate Court, and the plaintiff therein sought to obtain an execution out of the District Court against such administrator to be satisfied by sale by the sheriff of the property in the hands of such administrator, and which property was at that time in the custody of the Probate Court, and the court held that the estate being administered upon in the Probate Court, an individual creditor could not obtain execution against the administrator nor by that means collect any part of his claim, pro rata or otherwise; that,

as the estate was in the custody of the Probate Court of the county and being there administrated, the District Court had no jurisdiction to order an execution to be satisfied by the sale of such property.

In the case of Mendenhall v. Burnette, 58 Kan., 355, also cited by plaintiff in error in support of this proposition (brief, p. 42), a judgment had been obtained against decedent in his life time, which, after his death, was revived against his personal representative and thereon an execution ordered for the sale of the real property upon which such judgment was a lien at the time of the death of the intestate, and the court there held that such execution could be levied upon the real property which was subject to the lien of such judgment in the life time of the debtor, but could not be levied upon any other property, real or personal, of the estate of such debtor and in no respect sustains the contention of the plaintiff in error.

The rights and liabilities of foreign executors and administrators are fixed by the statute of the state where they seek to enforce the one or evade the other.

It is a question purely of state statute and for that reason decisions of courts of other states, based upon the statutes of such states, afford no aid in construing the law of such state.

And again the rule that this court considers itself bound by the construction and validity of the state constitution and statute as given by the courts of last resort of the state prevails.

Burgess v. Seligman, 107 U. S., 20., 6 Syll., also 69 U. S. 210 at 216., 94 U. S. 260-268.

For which reason, we do not consider the authorities cited (pp. 50-51, br. plff. in error). Nor is the question of the equitable jurisdiction of the District Court, which arises in suits in equity, involved.

Such cases rest upon an entirely different ground, which it is readily perceived, does not apply in this case.

The rule of the decision of the Kansas Supreme Court in Cady v. Bard, 21 Kan., 667, and the rule there discussed and stated, that a non-resident executor or administrator may sue or be sued, and the many decisions following that, cannot be evaded by the mere suggestion that "attaching the mortgaged land was, therefore, an idle proceeding." (Brief plff. in error p. 53).

Under numerous decisions of the state of Kansas, a plaintiff may have an attachment against mortgaged as well as other lands and may have a judgment for the entire amount of the debt, and there is not in the opinion of the court in that case, anything which sus-

tains the claim of counsel that such attachment was "an idle proceeding."

The suit was not to foreclose a mortgage as statee in such brief but to recover on *a contract* alleged to have been made by the defendants *in the foreclosure of a mortgage on real estate.* Property was attached, and service sought by publication. A motion to set aside such service upon the ground now urged by plaintiff in error, was sustained by the trial court, and the error of the court in such ruling, was the question presented to and decided by the Supreme Court. It does *not appear* from the statement of the case as claimed by plaintiff in error (brief, p. 53) that it was an action to "foreclose a mortgage" nor that such decision "was properly reversed by the Supreme Court because service could be had against them by publication in an action to foreclose a mortgage".

Suit in equity was not proper under the Kansas law.

Under the Kansas Code (Sec. 4438, G. S. 1901), "The distinction between actions at law and suits in equity" is abolished, and the statute also, as quoted, in our brief expressly authorizes suits of the nature of this one to be commenced by attachment of property, and gave the plaintiff a remedy at law, which remedy will not be denied to the plaintiff because, in other states, the same relief might have been had by a suit in equity. The correctness of the judgment of the Kansas Court must be determined by the statutes of that state and not by those of other states, for which reason we deem it wholly unnecessary to discuss many of the authorities cited in brief of plaintiff in error, pp. 54 to 67.

Many authorities are also cited in which the power of a court of general jurisdiction to appropriate assets of an estate was denied, for the reason, as stated therein, that the *jurisdiction of a Probate Court had already attached* to such assets before the proceedings in a court of record, and that such assets were in *gremio legis*, and this upon the well recognized rule that the court first acquiring jurisdiction of the assets, retains the same to the exclusion of all other courts.

For that reason, the District Court properly retained jurisdiction and rendered the judgment, as no administration had been commenced in Kansas upon the estate of George Manley, de-

ceased, and having first obtained jurisdiction thereof it would be retained. But, in this case, no other court acquired jurisdiction. The copy of the will and of the appointment of the executor by the court in New Jersey was filed in the Kansas Probate Court January 11, 1896, several months after the commencement of suit by plaintiff below, but no further proceedings were taken or administration had and such Probate Court therefore never obtained jurisdiction of the assets of such estate. The State of Kansas stands almost alone in the matter of authorizing the prosecution of suits by and against foreign executors. Such law is commented upon and approved in Reno on Non-Residents, Secs. 59-60, and in 1, Woerner on American Law of Administration (2nd Ed. Sec. 160) where it is said: "No executor or administrator can, in his official capacity, originate or maintain an action in the courts of any country, save that which has granted him letters testamentary or of administration, without authority from a country in which he brings the action;" and Sec. 163, where it is said: "and where the statute authorizes them to sue and be sued, in like manner as a non-resident may be sued, an attachment against them will divest them of all interest in the property attached." With citation of the Kansas statute authorizing such action and Cady v. Baird, *supra*.

Counsel has further cited in support of his

contention many authorities in which the controversy arose in cases in which local administration had first been granted by the proper Probate Court, and there was an attempt by subsequent proceedings in another court to appropriate certain assets, and also cases in which it was held that an executor may do certain things to protect the estate before the will is admitted to probate and when the will is so probated, it relates back to the death of the testator, but all such cases involved only the question in the state of the executor's domicile and appointment, and must be distinguished from this case and from other cases in which the controversy is between an executor, resident of and appointed by the laws of one state, and the appropriation of the assets of the estate situated in and controlled by the laws of another state.

Plaintiff in error in his brief and argument has entirely abandoned all error based upon the claim contained in specification of error one that the District Court of Atchison County, Kansas, did not give full faith and credit to the public acts and judicial proceedings of the surrogate of the Orphans Court of Union County, New Jersey, and also the claim that plaintiff in

error had been deprived of his property without due process of law.

The statutes of Kansas are not in conflict with Sec. 2, Art. 4, or the Fourteenth Amendment to the Constitution of the United States.

The specifications of errors based upon the claim that the statutes of Kansas under which the suit was prosecuted to judgment in the courts of that state, are in violation of such provisions (and in his brief numbered Third, Fourth and Fifth (pp. 67-8),) present in fact a single question, to wit:

Does such statute of Kansas fail to accord to the plaintiff in error, as a citizen of New Jersey, all the privileges and immunities to which he is entitled, or does it abridge such privileges, within the meaning of such provisions? The statutes of Kansas provide that upon the decease of any inhabitant of the state, letters testamentary or of administration on his estate, may be granted by the Probate Court of the county in which the deceased was

an inhabitant, and that upon the decease of a person intestate in any other state or county, leaving an estate, administration thereof may be granted by the Probate Court of any county in which there is an estate to be administered, and that such administration shall extend to all of the estate of the deceased within that state. Sec. 1, Executor's and Administrator's Act. It also provides that letters testamentary and of administration shall in no case be granted to a non-resident of the state. Sec. 28 same act. It also provides that if wills be executed and proved according to the laws of any other state or territory relative to property in the State of Kansas, they may be admitted to record in the Probate Court and when so recorded, shall have the same validity as wills made in that state. Sec. 144 same act. Also, that when so recorded, the court may grant letters testamentary or of administration with the will annexed, but only to a person resident of the state, and then may proceed in the settlement of the estate that may be found in that state. Secs. 144 and 174 same act. Under the statutes of that state, when letters testamentary or of administration are granted by a Probate Court, the entire estate within the State of Kansas is thereby drawn into the jurisdiction of that court and claims must be allowed in that and paid pro rata in the order of priority from the estate to be sold by order of that court.

It is further provided by such statutes that any non-resident may sue or be sued in the general courts of that state in all respects as a resident, and that in certain cases suits may be brought by attachment upon the ground of non-residence of the defendant.

It is also a provision of such statute (Sec. 203 above quoted) that non-resident creditors and administrators may sue or be sued in their capacity of executors or administrators in like manner as other non-residents.

The sole question presented by such assignments of errors three, four and five is:

Does such last mentioned section deprive the plaintiff in error of any privilege or immunity or abridge any privilege to which he, as an executor appointed under the laws of New Jersey, is entitled?

The claim that it has such effect is based upon the ground that in case of a resident administrator, the estate must be divided pro rata among the creditors thereof and cannot be appropriated by one or more of such creditors by attachment proceedings, whereas, under such Section 203, a non-resident executor having property of the estate within such state, may be sued by attachment and the property appropriated by the attaching creditor or creditors to the exclusion of any other creditor.

But no creditor is making such claim.

Any estate within that state could be appropriated for the payment of debts and under such statutes, the non-resident executor can receive and hold whatever of the assets may remain after the payment of such creditors. Such non-resident executor is, therefore, not deprived of any money or property by such proceeding. In either case, of local administration in the Probate Court or suit by attachment, so much of the estate as is necessary to pay the claims presented to the Probate Court or exhausted by attachment, will be appropriated in payment of such claims. The non-resident executor or administrator is entitled to and can receive whatever remains of the estate

In either case, the property of the estate, to the extent necessary to pay such debts is exhausted, and the non-resident executor is entitled to and can receive the balance. He is not, therefore, deprived of any money or property, nor of any privilege whatever unless it be the naked privilege of administering the estate in Kansas while he continues a non-resident and is entirely beyond the reach of the process of the Kansas courts.

It was never intended, by such provisions of the constitution to authorize an officer appointed by the court or laws of one state, to carry into another state and there enforce or execute the authority vested in him by virtue of the office which he fills. If such construc-

tion gives such right to an executor or administrator appointed by the courts of New Jersey, it would give the same right to the sheriff, coroner, marshal, judge or governor of such other state. If the authority of an officer of one state, under such provision of the statute of his state, authorizes him to go into a sister state, and there exercise such authority, the jurisdiction of the different states and of their officers ceases to be limited by the state boundaries, and all the provisions of respective statutes, as to the exercise of official authority, extends throughout all the other states of the United States, and state lines and state jurisdiction is abolished and we have in place of the jurisdiction, power and authority of the respective state officers, in each state, the jurisdiction, power and authority in each state of the officers of all the different states acting under the laws and the directions and orders of the courts of the different states.

The rule urged by plaintiff in error, that the executor of New Jersey, appointed under the laws and acting under the orders of the court by which he was appointed, has such power and authority in the State of Kansas, leads unavoidably to such condition and proves that his conclusion is *reductio ad absurdum*.

Such provisions were not adopted with the purpose and intention that they should be given such effect.

In addition to this, the statutes of Kansas have made ample provision for the administration of the estate of non-resident decedents, by authorizing those interested therein to proceed ing one of the Probate Courts of the county in Kansas in which there is property of such decedent, and there have an administrator appointed and have the estate administered, in all respects as the estates or resident decedents are administered, and in which case the property of such estates could not be appropriated by attachment or other proceeding in the courts of record. But such foreign administrators or executors, or others interested in the estate of non-resident decedents, cannot, while refusing to have resident administration of such estates in the Probate Court, deny to any other creditor the right to appropriate the property of such decedent to the payment of the claims of such creditors. If the parties interested in the estate of such non-resident decedents refuse to have administration in the Probate Court, they cannot thereby compel a resident creditor to proceed in the Probate Court for the benefit of all the creditors of such estate, instead of proceeding in the District Court for their own benefit by attachment of the property of the estate.

Under such laws of Kansas, the non-resident executor or administrator has the same right to prosecute suits against other parties, resident and non-resident, as is given to resi-

dents of the state. They are not, therefore, deprived of any privilege or immunity which is given to any other person or persons. So far as the estate of the non-resident decedent or non-resident executor thereof is concerned, it is wholly immaterial whether it be appropriated in payment of debts by proceedings in one court or another; in the Probate Court or in the District Court; by sale of property by an administrator or by a sheriff, and such provisions of the constitution could never have been intended to prevent a state from arranging and parcelling out the jurisdiction of its several courts at its discretion.

The sole distinction between the two classes is that of residence and non-residence; a distinction which, in the nature of things, must exist, and in the proceedings against such classes, a difference must of necessity be made in the procedure and in the process by which jurisdiction is obtained. In the case of the resident, the court can obtain jurisdiction of the person and of the property. In case of the non-resident, jurisdiction cannot be obtained of the person. Only the *res* can be brought within the jurisdiction of the court. If this distinction is not to be recognized in the State of Kansas, it cannot be recognized in any other state, with the result that the property of a non-resident debtor in a state other than that of his residence cannot be appropriated in the payment

of his debts whether the creditor be a resident or non-resident, for no jurisdiction can be obtained over the person. To prevent such fraud in the withholding of property in the payment of just debts, the states must be permitted to authorize such proceedings in the courts as will enable them to appropriate the property of the non-resident estate as they cannot obtain jurisdiction over the person.

Such statutes authorize the same proceeding against all non-residents, and in favor of all non-residents, and operate alike on all persons and property similarly situated and so the equal protection of the laws cannot be said to be denied.

Walston v. Nevin, 128 U. S., 578.

Mo. P. Ry. Co. v. Macky, 127 U. S., 205.

The amendment could never have been intended to prevent a state from arranging and parceling out the jurisdiction of its several courts at its discretion.

Bowman v. Lewis, 101 U. S., 22.

Hayes v. Missouri, 120 U. S., 68.

By the sixth specification of error urged by plaintiff in error (br. p. 102), it is contended that because jurisdiction was obtained over the person of the plaintiff in error by attachment of the property in his charge, and because attachment was unauthorized, the court obtained no jurisdiction over the person or property and for that reason the judgment was void and not *res judicata*, and that the plaintiff in error had the right to have it set aside at any time by motion.

This involves questions of jurisdiction of the person, jurisdiction of the subject matter and that because the court erred, if it did err, in holding that the law under which the attachment was sustained was constitutional, such judgment was void and therefore not *res judicata*.

The plaintiff voluntarily appeared and thus gave the court jurisdiction of his person.

Such voluntary appearance was first, by demurrer, then by answer and full appearance at the trial, and having voluntarily submitted himself to the jurisdiction of the court, he cannot now be heard to complain that the court did not have jurisdiction of the person.

Under the statutes of Kansas, the property could be attached, the defendant being a non-resident executor having property which was attached in the State of Kansas, for the collection of a liability due from a stockholder, which is a contractual liability and one for the collection of which property may be attached on the ground of non-residence of the defendant, and the court had, therefore, jurisdiction of the subject matter.

No error of the court in the construction of any law or constitution can defeat its jurisdiction over the subject matter.

Having jurisdiction of actions of the same general nature, it had jurisdiction of this action and of the subject matter thereof, and the fact, if it is a fact, that the court erred in the construction of the law or in holding that the same was not in conflict with the constitution of either the State of Kansas or of the United States, could not defeat jurisdiction over the subject matter. If the court had held that such statute of Kansas was in conflict with the state or Federal constitution and rendered judgment in favor of the defendant, no question could ever arise that such judgment would

not have been within the jurisdiction of the court, and valid and binding. The estoppel of judgment must be mutual. It must be good as to both parties or bad as to both. Had the contention of the defendant below, plaintiff in error, prevailed in the state court and that court thereon had held that the action could not have been maintained by the plaintiff by attachment, such judgment would have been binding upon the plaintiff below and he could not have subsequently prosecuted a further suit upon such claim. The court having jurisdiction of the cause of action had jurisdiction to decide wrong as well as right, and its jurisdiction was not affected in any respect by any error in the judgment rendered. The judgment was, therefore, made by a court having jurisdiction of the person and of the subject matter, and is *res judicata* even though erroneous.

We concede that if the court did not have jurisdiction of the person or of the subject matter, its judgment was void and might be attacked by motion to vacate, but since it was not void but at most only erroneous, it could not be so attacked except by proceedings in error or appeal, which proceeding the plaintiff in error failed to pursue and such judgment was affirmed by the Supreme Court by dismissal. There is no question in this case of a judgment having been rendered by a self-

constituted body or a court not empowered by its government to take cognizance of the subject it decided, nor any question of the power of the court to have rendered a judgment in this case against the plaintiff below, nor to have rendered the judgment it did render in favor of plaintiff below.

Even where a court has jurisdiction of a general class of cases there may be specific limitation upon the power of the court as to certain specific cases within such class, and where there is such specific limitation, a judgment in excess thereof would be beyond the jurisdiction of the court and void. Such was the case in United States v. Walker, 109 U. S., 258, in which the court having probate jurisdiction ordered a discharged administrator to pay over moneys received by him as such *to his successor.*

Under the statute, the court had no power to order such moneys to be so paid, but only to order the discharged administrator to deliver the estate *not administered* to his successor.

In a suit upon the administrator's bond, breach was alleged based upon the failure of such administrator to pay over the money collected by him to his successor, as so ordered by the court, and it was held that the order of the court having probate jurisdiction was to that extent void, and the failure to pay such money

to the administrator *de bonis non* did not give him a right of action upon the bond of the discharged administrator, to recover the money so collected.

Such case fairly illustrates the distinction between judgments in excess of the power of the court, but in a class of cases of which the court has jurisdiction, and cases in which the judgment of the court is simply erroneous or wrong by reason of misconstruction of a statute or constitution.

In the one case, the judgment is beyond the express jurisdiction of the court as limited by statute, and void; in the other case, it is simply erroneous and not void. Of a similar nature is the class of cases in which the judgment is rendered entirely outside of the issues in the case. In such case, judgment beyond the issues is upon a matter not submitted to the court for its determination and a nullity. In such case, the court would not have jurisdiction of the subject matter, because the same was not presented to it for determination. The case at bar is not within either or any like exception nor within any of the exceptions to the general rule stated in the reasons and authorities cited in brief of plaintiff in error. In this case the District Court had jurisdiction of cases of the same general nature. There was no specific limitation upon the power

of the court in this particular case or cases or like nature, nor was the original judgment of the court outside of the issues presented and was not therefore void and could not be attached by motion to set aside, and the decision of the Supreme Court of Kansas denying such motion was correct.

There was no error in the order of Sale by terms of the original judgment of the property attached.

The seventh specification of error, that the order of the District Court directing the sale of attached property was not *res judicata*, and for that reason might be contested and should have been set aside on motion of plaintiff in error, is neither well taken nor fairly discussed.

Such error is not included within the assignments of errors filed. (Record p. 53.)

Such error, if error it was, is based upon the construction of the Kansas statute, practice

and decisions, and upon alleged error under the rules established therein. Such question of practice and the construction of the Kansas constitution and statutes in relation thereto, is binding upon this court. At least, this court considers itself bound thereby and such error, if it was an error, will not be reviewed by this court.

The argument is made that an order to sell attached property is not *res judicata*. The argument that the property was "exempt from judicial process", is an attempt to apply a rule of law which exists in those cases in which property is *exempt*, to this case in which the claim relied upon, is the error of the court in rendering the judgment and order of sale.

In support of such contention plaintiff in error has cited a number of Kansas decisions in cases which arose and depended upon the confirmations of sales of real estate, and in which cases it was held that "confirmation of execution sales of real estate involved only the regularity of such proceedings and did not involve or decide the title or any other question, and such decisions were, for that reason, not *res judicata* as to any question of title, ex-

emption or any question not involved in the proceedings relating to such sales, and for the reason stated to wit: that the confirmation of such sales involved only the regularity of the proceedings therein.

The authorities cited in no respect apply to the doctrine of *res judicata* as to the effect of the judgment, including the order for sale of attached property which, under the statutes of Kansas, is a part of the judgment and such authorities only apply to the proceedings directly relating to the sales.

Such claimed assignment of error is, therefore, not involved in this case nor are the authorities in support thereof in any respect in point.

To recapitulate we respectfully submit that the Federal questions relied upon by plaintiff in error were not raised in time, were not involved in or necessary to the decision of the Supreme Court of Kansas, and, for that reason, the motion to dismiss or affirm should be sustained, and that errors assigned as first, second, sixth and seventh rest entirely upon the construction given by the Supreme Court to the statutes and constitution of the State of Kansas, and this court considers itself bound thereby, and such errors are not sufficient grounds to authorize a reversal of the case.

Errors assigned as three, four and five do not apply for the reason that the facts urged in support thereof, appearing upon the record, do not sustain the contention made, and it does not appear therefrom that the plaintiff in error was deprived of or denied any privilege or immunity to which he was entitled, and the only distinction made by the statutes of Kansas between the plaintiff in error and other persons of the same class and citizens of the State of Kansas is that of residence and non-residence and apply alike to all persons of the same class and are therefore not within the prohibition of Sec. 2 of Art. 4 or the Fourteenth Amendment of the constitution of the United States. It follows that if the case is retained and decided upon its merits, the decision of the Supreme Court of Kansas should be affirmed.

Respectfully submitted,

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